Supreme Court of the United States.

October Term, 1970.

No. 1506.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,

v.

CHARLES W. BARTLETT, TRUSTEE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI.

JOINT BRIEF FOR CHARLES W. BARTLETT, TRUSTEE OF THE PROPERTY OF THE BOSTON AND PROVIDENCE RAILROAD, AND CHARLES W. MULCAHY, JR., JAMES GARFIELD, HANS JACOBSON AND WILLIAM E. NELSON, REORGANIZATION MANAGERS.

Questions Presented.

1. Whether the consummation of the confirmed Plan of Reorganization of the Boston and Providence Railroad Corporation, Debtor, should be indefinitely postponed by reason of the alleged pendency of a petition, filed in this Court in 1970, under 11 U.S.C. Section 208(a) (1).

2. Whether the petitioner is entitled to any further review of the Debtor's confirmed Plan of Reorganization.

Statement of the Case.

This proceeding for reorganization of the Debtor under Section 77 of the Bankruptcy Act (11 U.S.C. 205) has been pending in the United States District Court for the District of Massachusetts since August 1938. The Plan of Reorganization ("Plan") was finally approved by the Reorganization Court on November 8, 1966 (*In the Matter of Boston & Providence Railroad Corporation, Debtor,* 260 F. Supp. 415). This Plan had and has the support of the Debtor's Trustee, the Debtor, all creditors, including the United States, the Trustee of the New York, New Haven & Hartford Railroad (the holder of some 43% of the outstanding stock of the Debtor) and the officially authorized Boston and Providence Railroad Corporation Stockholders' Committee, representing the publicly held stock. The only opposition has come from a very small group of stockholders calling themselves the Development Group.

Since the District Court's approval of the Plan the same has been confirmed, said confirmation has been upheld by the Court of Appeals for the First Circuit and certiorari has been denied. *In the Matter of Boston & Providence Railroad Corporation, Debtor,* 413 F. 2d 137 (1st Cir. 1969) (reh. den. August 31, 1969), cert. den. 90 S. Ct. 1103 (March 16, 1970), reh. den. 90 S. Ct. 1496 (April 27, 1970).

On February 23, 1971, the District Court ordered the consummation of the Plan on or before April 26, 1971, the final date on which such consummation can obtain for the Debtor's estate the benefits of a tax-free liquidation under Section 337 of the Internal Revenue Code.

Since the Plan was approved in November of 1966, the Development Group has taken three appeals to the Court

of Appeals, has filed four petitions for certiorari or mandamus in this Court, and at least three petitions in various courts under Section 208 of the Bankruptcy Act (11 U.S.C. 208 (a) (1) and (2)), together with nine motions for rehearing, reconsideration or vacation of court orders. Most of the petitions, motions and appeals were filed just before, or even after, the limits fixed by rule or statute although, as the subject matter was largely repetitious, it would seem that they could have been presented much more promptly. If the petitions for certiorari had each been filed within thirty days, and the other petitions and notices within ten days, after the date of the order appealed from, a total of over a year's time could have been saved.

The history of the proceeding, beginning with the District Court's approval of the Plan, is shown in the following schedule in which all petitions, motions and appeals (with the possible exception of item 23 below) were the work of the Development Group. The number of days actually taken for each filing appears in the parenthesis following the applicable item.

1.	12/ 1/66	Motion for new trial filed in District Court. (22)
2.	12/ 7/66	Motion (item 1) denied.
3.	1/ 6/67	Notice of appeal from item 2. (30)
4.	3/29/67	Appeal (item 3) dismissed "for want of diligent prosecution."
5.	4/12/67	Petition for rehearing of item 4 filed. (14)
6.	4/18/67	Petition (item 5) denied.
7.	9/14/67	Petition for mandamus filed.
8.	9/15/67	Petition for certiorari filed. (150, two 30-day extensions having been granted)
9.	12/ 4/67	Petitions for mandamus and certiorari denied.

10.	4/19/68	Petition under 11 U.S.C. 208 (a) (1) to return Plan to ICC filed with District Court.
11.	4/24/68	Plan returned to ICC.
12.	9/16/68	Reconsideration of Plan (per item 10) denied by ICC for lack of justifying new developments.
13.	10/25/68	Petition for reconsideration of item 12. (39)
14.	10/31/68	Petition (item 13) denied.
15.	11/ 4/68	Confirmation order entered by District Court.
16.	11/14/68	Motion to amend confirmation order. (10)
17.	12/ 4/68	Motion (item 16) denied.
18.	2/ 1/69	Notice of appeal from confirmation order (item 15). (59)
19.	7/24/69	Confirmation order affirmed by Court of Appeals.
20.	8/ 7/69	Petition for rehearing on item 19 filed. (14)
21.	8/21/69	Petition (item 20) denied.
22.	11/24/69	Petition for certiorari filed. (95, without an extension of time)
23.	2/28/70	Petition filed* in Supreme Court to return Plan to ICC under Sec. 208(a) (2)
24.	3/16/70	Petition for certiorari (item 22) denied. (397 U.S. 979)
25.	3/18/70	Petition, purportedly under Sec. 208(a) (1), filed in the Supreme Court.
26.	4/ 8/70	Petition filed in Supreme Court entitled "Petition for Rehearing and Supplemental Petition under 11 U.S.C. 208." (24)
27.	4/27/70	"Petition for rehearing and for other relief denied." (397 U.S. 1071)
28.	6/22/70	District Court order authorizing application to ICC for consummation order.
29.	7/ 2/70	Motion to reconsider and vacate item 28. (10)

* In the name of the "Greater Boston Committee on the Transportation Crisis."

30.	7/ 8/70	Motion (item 29) denied.
31.	8/ 7/70	Notice of appeal from items 28 and 30. (30)
32.	12/24/70	Order authorizing filing of application for consummation order (item 28) affirmed by Court of Appeals. (435 F. 2d 825)
33.	12/29/70	ICC order authorizing consummation of Plan.
34.	2/ 1/71	Petition to ICC for reconsideration of item 33. (34)
35.	4/13/71	Petition (item 34) denied.
36.	2/23/71	District Court order for consummation and Final Decree.
37.	3/ 5/71	Motion to amend item 36. (39)
38.	4/11/71	Motion (item 37) denied.
39.	3/22/71	Petition for writ of certiorari filed.

Argument.

1. This Court should not refer the Plan back to the Commission pursuant to section 208(a) (1) because

a. No petition for such reference was at any time properly before this Court.

Under the statute (11 U.S.C. 208(a) (1)) a petition would have had to be filed with the Court more than eighteen months after final disposition of a prior petition under that subsection and before confirmation of the Plan had become judicially complete.

The previous petition under section 208(a) (1) was finally disposed of on October 31, 1968 (*not* September 16, 1968, as erroneously asserted by petitioner) when the Commission denied petitioner's motion for reconsideration of its September 16, 1968 denial of reconsideration. The confirmation order became finally effective on April 27, 1970, when this Court denied the Development Group's petition for "rehearing and for other relief." *Boston & Providence*

Railroad Development Group v. *Bartlett, Trustee in Reorganization,* 397 U.S. 1071, 25 L. Ed. 2d 696, 90 S. Ct. 1496 (April 27, 1970). Thus final confirmation took place within eighteen months of disposal of the previous petition. There has not at any time either before or after April 27, 1970, been any statutory basis for the filing of a petition under Section 208(a) (1). Petitioner's assertion that such a petition is pending, or "lies before the Commission" is disposed of by the Commission's Order, served in these proceedings (Finance Docket, 12131) on April 13, 1971, in which it is expressly stated that no Section 208(a) (1) petition was properly before the Commission.

b. This matter has already been finally determined by this Court. When, on April 27, 1970, this Court denied the Development Group's petition for rehearing, the Court's decision also disposed of the Development Group's petition for Section 208 relief. The relief sought in the Development Group's April 8, 1970, "Petition for Rehearing and Supplemental Petition under 11 U.S.C. 208" included a request that the Court refer the Group's 208(a) (1) petition of March 18, 1970, to the Commission. The Court's decision reads "Petition for rehearing and *for other relief* denied." (397 U.S. 1071, 25 L. Ed. 2d 696, 90 S. Ct. 1496. Italics supplied.) The "other relief" denied obviously referred to the request for action with respect to the section 208 petition and could, indeed, have referred to nothing else, since no relief other than rehearing of the denial of certiorari and action on the Section 208 petition was requested in the Development Group's said petition of April 8, 1970.

2. While petitioner has filed a document entitled "Petition for a Writ of Certiorari," the conclusion of that document does not in fact request any further curial review but only action by the Commission. Petitioner is, how-

ever, clearly not entitled to have the Plan further reviewed either by the Commission or the Courts. It has been finally and fully confirmed and is, therefore, binding on all creditors and stockholders, whether or not they voted to accept it. Section 77(f) of the Bankruptcy Act says,

> "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of Judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it. . . ." 11 U.S.C. 205(f).

As indicated in the statement of the case above, the right of judicial review has been fully exercised. Such review has finally disposed of all constitutional, as well as all other, issues. The minority stockholders claiming to be the Development Group have no further right to contest the Plan nor to suggest changes which they claim should be made in it. The relief sought in their petition for certiorari is that the Plan should be changed, by the Commission, despite final confirmation. The statute does not permit such change.

Conclusion.

For the foregoing reasons the parties hereto respectfully urge that the petition for certiorari be denied.

Respectfully submitted,

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